IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.816 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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ZENITH SPINNERS, ZENITH EXPORT THRO UMESH L KHANDELWAL
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR AMAR DAVE for Petitioner(s) : 1,
MR JITENDRA MALKAN for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 17/11/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. This petition, under Article 226 of the Constitution of India, primarily challenges 14

show cause notices issued on 8th September, 2004 (Annexure-C Collectively). The following prayers are made in the petition:

A) That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, holding and declaring that Notification No.10/2004-CE (NT) dated 3.6.2004 (Annexure “D” hereto) is ultra-vires the provisions of Rule 19 of the Central Excise Rules, 2002 and therefore, the same is struck-down;

B) That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, quashing and setting aside the Show Cause Notices at Annexure “C” collectively, which are issued pursuant to the aforesaid Notification No.10/2004-CE (NT) dated 3.6.2004;

C) Pending hearing and final disposal of the present petition, Your Lordships

may be pleased to issue appropriate writ, direction or order, directing the respondents to forthwith sanction the rebate claims filed by the petitioner which are at Annexure “A” collectively and be further pleased to restrain the respondents Nos.2 and 3 from adjudicating the show cause notices at Annexure “C” collectively;

D) An ex-parte ad-interim relief in terms of para (C) above may kindly be granted;

E) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted;

2. After the petition was admitted vide order dated 11th March, 2005 the same was taken up for hearing as regards interim relief. However, as no order was made Civil Application No.3025 of 2005 came to be moved by the petitioner. The said Civil Application was rejected vide order dated 3rd May, 2005. The petitioner thereupon approached the Apex Court and vide order dated

5th September, 2005 the matter came to be dismissed. However, the Apex Court granted the petitioner leave to file one more Civil Application seeking expeditious disposal of the Special Civil Application with the observation that the High Court may preferably dispose of the matter within a period of three months. Accordingly, the petitioner moved Civil Application No.8501 of 2005 which came to be granted vide order dated 7th October, 2005 with consent of the parties. It is in the aforesaid circumstances that this petition is taken up for final hearing and disposal today.

3. The petitioner is a proprietary concern of M/s. Zenith Exports Limited. The petitioner is inter alia engaged in the business of manufacture of Viscose Yarn (Viscose content 100%). It is an admitted position that the petitioner has been procuring duty free inputs i.e. 100% Viscose Staple Fibre under Notification No.43/2001-Central Excise (NT) dated 26th June, 2001 after

following the procedure prescribed under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. There is no dispute that the petitioner manufactures final product known as “Viscose Yarn” for the purposes of exports only. Similarly, there is no dispute that the final product is actually exported.

4. However, by virtue of Amendment Notification issued by the Central Board of Excise & Customs (CBEC) being Notification No.10 of 2004-C.E. (N.T.) dated 3rd June, 2004 sub-paragraph (vi) to Paragraph No.2 came to be substituted by the said Notification and Explanation-II came to be inserted. It is the stand of the petitioner that by virtue of this Notification, though termed to be clarificatory in nature, the entire scheme laid down in Rules 18 and 19 of the Central Excise Rules, 2002 (the Rules) has been given a go-by and hence, the said Notification be treated as bad in law. It is an accepted

position that the impugned show cause notices have been issued on the basis of the aforesaid Amendment Notification.

5. Mr.Amar Dave, learned advocate appearing on behalf of the petitioner, submitted that Rule 18 of the Rules pertains to rebate of duty; that such rebate is available to an exporter in relation to duty paid on final products which are excisable goods, or in relation to duty paid on raw material used as inputs in manufacture or processing of such final products. That by virtue of Rule 19(1) of the Rules an exporter is entitled to export final products without payment of duty after executing the necessary bond in this regard and under sub-rule (2) of Rule 19 of the Rules any material which is used in the manufacturing or processing of goods i.e. final products which are exported can also be removed without payment of duty. He, therefore, urged that both under sub-rule (1) and sub-rule (2) of Rule 19 of the Rules an exporter has the

option to seek exportation of final products or removal of inputs without payment of duty, but in the event an exporter exercises option only qua one or the other sub-rule and claims rebate under Rule 18 qua the final products the provisions, as they stand, permit such a course of action. But by virtue of the Amendment Notification dated 3rd June, 2005 the option available with an exporter is taken away and the exporter who opts to remove the inputs without payment of duty is forced to export the final products also without payment of duty, even though the exporter is entitled to claim rebate under Rule 18 in relation to the duty paid on such final products. He, therefore, urged that the said Amendment Notification be struck down as going beyond the provisions of Rule 19 of the Rules.

6. An incidental submission was made by referring to Rule 5 of the CENVAT Credit Rules, 2004 (CENVAT Rules) to contend that in a case where

an input is used in the final product which is cleared for export under bond CENVAT Credit in respect of the input so used is to be allowed to be utilized by the manufacturer towards payment of excise duty on any final product cleared for export or home consumption. Thus, the submission was that by virtue of the Amendment Notification even this provision was being rendered nugatory or redundant. He, therefore, urged that the impugned Notification should not be permitted to operate.

7. Mr.J.M.Malkan, appearing on behalf of the respondents, submitted that the impugned Notification was issued in exercise of powers conferred by sub-rule (3) of Rule 19 of the Rules. That the amendment was merely clarificatory in nature and was thus applicable to all the transactions, whether before the date of the Notification or after the date of Notification. That Rule 19 of the Rules was independent of Rule 18 of the Rules and,

therefore, the petitioner could not claim the relief by way of rebate under Rule 18 of the Rules when he was availing of the benefit of procuring duty free inputs by virtue of sub-rule (2) of Rule 19 of the Rules. According to him, the schemes under Rules 18 and 19 operated independent of each other and the petitioner cannot have any grievance. He read extensively from the affidavit-in-reply filed by respondent No.2 in support of the submissions and emphasized the fact that the impugned Notification dated 3rd June, 2004 had been issued only qua the goods exported under Rule 19 of the Rules. The intent and purpose of the Notification is stated to be ".....What the notification seeks to uphold is that the material received under Notification No.43/2001-CE(N.T.) dated 26.06.2001 as amended i.e. without payment of duty, does not enjoy a double benefit of receiving the rebate back on the goods that have not suffered duty ....." as averred in Paragraph No.8 in the affidavit-in-

reply. The submission was that in such an eventuality the petitioner cannot be permitted double benefit and in absence of any infirmity in the impugned Notification, the petition be rejected.

8. It was also submitted during the course of hearing that even if, the respondent authority has not established that the petitioner has in fact availed of any double deduction, the matter was at the stage of show cause notice, and in the circumstances after the petitioner tenders its reply, is heard and adjudication process is undertaken, that the facts can come on record, whether in fact the petitioner has derived double benefit or not. He, therefore, submitted that the respondent authority be permitted to proceed with the proceedings in pursuance of the show cause notices.

9. Rules 18 and 19 of the Rules read as under:

Rule 18. Rebate of duty. -- Where any goods are exported, the Central Government may, by

notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

Explanation. - “Export” includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

Rule 19.Export without payment of duty.-- (1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer nor the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the

Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

10. Rule 18 of the Rules stipulates that where any goods are exported the exporter becomes entitled to rebate of duty which may be granted by way of a notification issued by the Central Government. The rebate is of duty paid on final products or duty paid on inputs used in the manufacture or processing of such final products viz. the goods which are exported. The notification is to contain such conditions or limitations and prescribe such procedure, upon fulfillment of which, the rebate shall be granted. Thus, on a plain reading Rule 18 provides a complete code by itself in relation to rebate of duty that an exporter can claim on export of goods.

11. Rule 19 of the Rules provides under sub-rule (1)

that an exporter may export final products which are liable to excise duty without payment of duty with the approval of the Commissioner. Sub-rule (2) of Rule 19 of the Rules makes a similar provision in relation to inputs which are used in the manufacture or processing of final products which are exported. While sub-rule (3) of Rule 19 of the Rules stipulates that export under sub-rule (1) or sub-rule (2) is subject to the conditions, safeguards and procedure that may be specified by the CBEC by way of a notification.

12. Therefore, on a plain reading of both the Rules i.e. Rules 18 and 19 it is apparent that the said Rules operate in separate fields. Rule 18 of the Rules comes into play only in relation to the final products or the inputs which are not only liable to duty but on which duty has been paid. The said Rule viz. Rule 18 of the Rules, cannot be invoked in case of either final products or inputs on which no duty is paid even

though the goods are liable to duty. The insistence of the respondent authorities, in the circumstances, that in a case where an exporter exercises option under sub-rule (2) of Rule 19 of the Rules in relation to inputs, which may be duty free, or which are removed without payment of duty on execution of bond, when used for the purposes of manufacture or processing of final products which are exported, the exporter must export the goods only under Rule 19(1) of the Rules is not borne out by the provisions of the Rules.

13. In a case where the final product itself is liable to duty and the exporter, on clearance of such goods for export, makes a claim for rebate on payment of duty at the time of clearance, cannot be prevented from doing so on the specious plea that the inputs used in manufacture of such final products were procured without payment of duty. There is no rationale for such course of action apart from the fact

that, as stated hereinbefore, the relevant Rules do not envisage any such requirement. The statement made on oath in the affidavit-in-reply by respondent No.2 that in such an eventuality an exporter would get double benefit is not supported by a plain reading of the provisions of the Rules. Nor has anything been brought on record to substantiate the aforesaid averment. It remains a bald averment not supported by any evidence on record.

14. There is one more reason. As can be seen from reading of sub-rule (1) and Rule (2) of Rule 19 of the Rules the opening portion grants an option to the exporter by virtue of the language used. In sub-rule (1) it is stated “Any excisable goods may be exported”, and in sub-rule (2) it is stated “Any material may be removed”. Therefore, the exporter has an option to export the final products without payment of duty or use inputs which are procured without payment of duty in the manufacture or processing

of goods which are to be exported. At the other end, the later portion of sub-rules (1) and (2) of Rule 19 of the Rules grants discretion to the Commissioner to approve the option that is exercised by an exporter by use of the phrase “as may be approved”. If the interpretation which is placed on the provision by the respondent authorities by issuance of impugned Notification is accepted, it would not only take away the option granted to the exporter but also take away the discretion granted to the Commissioner by the Rule. It is settled position that by virtue of exercise of powers of issuing a notification which is for the purposes of imposing conditions, safeguards and procedure the authority cannot exceed the jurisdiction by providing for a situation which either restricts the rights granted under the Rule itself or make the Rule itself redundant.

15. It is not disputed that the original

notification issued by CBEC under sub-rule (3) of Rule 19 of the Rules on 26th June, 2001 and made effective from 1st July, 2001 has been operating without any difficulty and nothing has been brought on record to show why the impugned amendment became necessary. At the cost of repetition it requires to be stated that nothing has been brought on record nor has the learned counsel been in a position to point out as to how and in what circumstances an exporter can claim double benefit.

16. The matter may also be considered from another angle. The power to issue notification under Rule 18 of the Rules is available with the Central Government while power under Rule 19(3) of the Rules is available with the CBEC. The Board is a creature of the statute and cannot go beyond the powers granted under the statute. If the Central Government has, in its wisdom, provided for granting rebate upon fulfillment of certain conditions and subject to certain

procedural safeguards, CBEC cannot be permitted to render the Notification issued by the Central Government redundant by issuing a notification in exercise of powers under Rule 19 of the Rules. Nor can CBEC exercise such powers so as to render Rule 18 otiose. Hence, for this reason also, the impugned Notification cannot be upheld.

17. The contention raised on the basis of Rule 5 of CENVAT Rules is not well founded. Even if, for the sake of argument, the stand of the Revenue is accepted and the Notification is upheld, all that would happen is that the petitioner in spite of becoming entitled to rebate under Rule 18 of the Rules would have to make a claim for refund under Rule 5 of the CENVAT Rules. This position becomes amply clear when one reads the later portion of Rule 5 of the CENVAT Rules which stipulates “and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount” subject

to the conditions, safeguards, etc. as may be notified. In these circumstances, the entire action of issuing the Notification appears to be misdirected as the same is revenue neutral. In case of an exporter who cannot claim rebate under Rule 18 of the Rules he would become entitled to claim refund under Rule 5 of the CENVAT Rules. The learned counsel for the respondent authorities was not in a position to dispute this position when his attention was invited to the same.

18. In the circumstances, the impugned Notification being Notification No.10/2004-CE(NT) dated 3rd June, 2004 is bad in law for the aforestated reasons, namely, it is not in consonance with the principal provisions, namely, Rules 18 and 19 of the Rules, and it is, even otherwise, Revenue neutral. The CBEC cannot exercise power under Rule 19 of the Rules to negate a notification issued by the Central Government under Rule 18 of the Rules. The same is,

therefore, declared to be bad in law and is quashed and set aside. As a consequence the impugned show cause notices (Annexure-C Collectively) are also quashed and set aside.

19. The petition is allowed, accordingly, to the aforesaid extent. Rule made absolute. There shall be no order as to costs.

20. At this stage Mr.Malkan makes a request to stay the operation of the judgment and order. No case is made out for granting the request and the same is, accordingly, rejected.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**